

STATE OF MICHIGAN
COURT OF APPEALS

OHIO FARMERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

MARCELLI CONSTRUCTION COMPANY,
TONY MARCELLI, and CYNTHIA MARCELLI,

Defendants-Appellants.

UNPUBLISHED
November 9, 2001

No. 221502
Oakland Circuit Court
LC No. 97-552567-CK

Before: Whitbeck, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendants appeal by right the order granting plaintiff's motion for summary disposition in this indemnity action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff provided a number of surety bonds for construction projects performed by defendant Marcelli Construction. The surety bonds contained an indemnity agreement requiring defendants to indemnify plaintiff for all losses and expenses sustained because of execution on the bonds, failure to perform or comply with the agreement, or in enforcing covenants and conditions of the agreement. Tony and Cynthia Marcelli were individual indemnitors on the bonds. Defendants failed to make payments to contractors and suppliers on a number of projects, and claims were made to plaintiff.

Plaintiff brought this action to recover payments made on bonds issued on a number of projects. The trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10).

Indemnity contracts are construed in accordance with the rules for the construction of contracts generally. *Pritts v J I Case Co*, 108 Mich App 22, 29; 310 NW2d 261 (1981). Interpretation of a contract with clear language is a question of law, which this Court will review de novo. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). A court determines whether the contract language is clear on its face. Contract terms must be enforced as written, and unambiguous terms must be construed according to their plain and commonly understood meaning. *Id.* A contract of indemnity should be construed to cover all losses, damages, or liabilities to which it reasonably appears that the

parties intended that it should apply. *Title Guaranty & Surety Co v Roehm*, 215 Mich 586, 592; 184 NW 414 (1921).

Once defendants failed to pay subcontractors and material suppliers, and plaintiff was required to pay under the bond, the indemnity agreement allowed plaintiff to obtain any contract proceeds owed to defendants by the owners of the projects. A surety who performs on a bond has a superior interest in funds from the project owner since there is a default as a matter of fact, even if the contractor is still working on the project, and there has been no formal declaration of default. *Earl Dubey & Sons, Inc v Macomb Contracting Corp*, 97 Mich App 553, 559-561; 296 NW2d 582 (1980).

A surety has a right to compromise and settle claims asserted against it. In doing so, it is required to act in good faith. *Transamerica Ins Co v Bloomfield*, 401 F2d 357, 362 (CA 6, 1968). Provisions that vouchers and evidence of payment are prima facie evidence of the propriety of the payment are enforceable. *Id.*

While defendants asserted that plaintiff did not act in good faith, they failed to present any evidence that would support this claim. Defendants did not present evidence to rebut plaintiff's prima facie claims. Defendants' proposed counterclaim was based on the same premise as the primary claim, plaintiff's lack of good faith. Where defendants failed to present support for that claim, the trial court did not err in denying their motion.

Affirmed.

/s/ William C. Whitbeck

/s/ Janet T. Neff

/s/ Joel P. Hoekstra